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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 239

ESTATE OF ARLESTER L. BURNELL, Ward,
Appellant,

VS.

STATE OF COLORADO
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

MOTION TO DISMISS APPEAL

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Colorado is reported in 439 P2d 38 (1968) and is appended to the Appellant's Jurisdictional Statement. The reported version of the Colorado Supreme Court's opinion was amended to correct an erroneous reference to CRS 1963 71-1-16 in the original version by adding to said statute, "as amended in 1965 Perm. Supp. CRS 71-7-1 et seq."

STATUTES INVOLVED

1. The correct citation to the statute involved is C.R.S. 1963, 71-7-1 (1965 Perm. Supp.)

STATEMENT OF THE CASE

Appellee's claims are in part based upon C.R.S. 1963 71-1-16 repealed by the 1964 Session Laws of Colorado, Chapter 59, Section 7, Page 64. That portion of appellee's claim accruing subsequent to the repeal of C.R.S. 1963, 71-1-16 is based upon C.R.S. 1963, 71-7-1 (1965 Perm. Supp.).

ARGUMENT

Appellee, pursuant to Rule 16 (1) (B), Rules of the United States Supreme Court, moves the Court to dismiss the Appeal herein on the following ground:

The Judgment of the Colorado Supreme Court Rests on an Adequate Non-federal Basis.

A. Jurisdictional Doctrines of this Court Applicable to this Case.

It has long been the policy of this Court to refuse jurisdiction of cases involving a judgment of a state court which, in addition to being founded on a federal ground, is supported by an adequate non-federal ground independent of the federal one. *Jankovich vs. Indiana Toll Road Com.*, 85 Sup. Ct 493 (1965). Moreover, this result is not changed by the fact that the "adequate non-federal ground" depriving this Court of jurisdiction to review is a state constitutional provision similar in nature and effect to a provision contained in the Federal Constitution. *Jankovich vs. Indiana Toll Road Com.*, supra. As a corrollary to the rule stated above, the record of a case under appeal must affirmatively reflect with "requisite certainty" that the decision of the Federal question was necessary for determination of the case. *Buck vs. California* 72 Sup. Ct 502. (1951) The application of the above jurisdictional doctrines relevant to the case at Bar is demonstrated by the following:

"The California Supreme Court did not state whether its holding was based on the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States or the equivalent provisions of the California Constitution, or both. While we might speculate from the choice of words used in the opinion, and the authorities cited by the Court, which provision was the basis for the judgment of the State Court, we are unable to say with any degree of certainty that the judgment of the California Supreme Court was not based on an adequate and independent non-federal ground. This Court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented . . ." *Department of Mental Health* vs. Kirchner, 85 Sup. CT. 873 (1965)

and

"An examination of the opinion of the California Supreme Court in the case before us does not indicate whether that Court relied on the State Constitution alone, the Federal Constitution alone, or both, and we would have jurisdiction to review only if the federal ground would have been the sole basis for the decision or the State Constitution was interpreted under what the State Court deemed the compulsion of the Federal Constitution. *Kirchner,* supra at pg. 874.

B. The Judgment of the Colorado Supreme Court was Based upon Section 25, Article 2 of the Constitution of the State of Colorado.

Section 25, Article 2, of the Constitution of Colorado is as follows:

"Section 25. Due Process of Law. No person shall be

deprived of life, liberty nor property without due process of law."

The Fourteenth Amendment, Section 1, of the United States Constitution provides in part:

"Nor shall any State deprive any person of life, liberty, nor property without due process of law."

The question of whether due process requirements of the above provisions were violated by CRS 1963 71-7-1 (1965 Perm Supp) was specifically raised in Appellant's brief filed in the Colorado Supreme Court (designated, "Reply on Application for Supersedeas", in Appellant's Amended notice and Designation of Record on Appeal to the United States Supreme Court), under Section "C" thereof captioned:

"The States claims are based upon Statutes which violate the due process clauses of the United States Constitution Amendt. XIV, Sec. 1 and *Colo. Const. Art. II, Sec. 25.*" (emphasis ours)

Appellant's due process argument was presented to the Colorado Supreme Court as follows:

"If prisoners in the penitentiary are compensated for their labor, as alleged in the brief of Appellant, the case for Burnell is a fortiori when it is considered that no compensation whatever is allowed him for his labor in behalf of the State performing menial but useful services at the hospital. Is this in conformity with our hallowed traditions of due process of law? The answer, it is submitted, must be negative." *Appellant's reply on supersedeas,* Section C, pg. 9

Hence, Appellant's due process opposition to C.R.S. 1963 71-7-1, (1965 Perm. Supp.) as expressed in their

brief to the Colorado Supreme Court, imposed upon that Court the task of deciding whether the inclusion of the criminally insane within the provisions of said Statute and the exclusion of convicted criminals therefrom constituted discrimination prohibited by Colorado and Federal Due Process. Prerequisite to proper resolution of this issue obviously required grouping convicts and the criminally insane into the same class. Accordingly, the Colorado Supreme Court replied to the Due Process contentions raised by Appellants in the following manner;

> "Assuming that such persons are not of a distinctive class, it is to be noted that *CRS 1963, 105-4-17,* provides 'every able bodied convict shall be put to and kept at the work most suitable to his capacity, and most advantageous to the people of the State of Colorado, and which may least conflict with the free labor of the said State, during his confinement. The earnings of said convict, after deducting sufficient amount thereof to pay and satisfy the cost of maintenance and retention, shall be given to the family of such convict or dependents, if there be any, and if there be none, the same accumulated shall be paid to such convict, upon discharge from the penitentiary,' similar provisions also exist concerning the care and maintenance of delinquents and other institutions under the Department of Institutions. . . . Thus, it may be seen from the Statutes that the cost of maintaining and caring for those in the various institutions of the State of Colorado, be they penal or medical are recoverable. Only the manner in recovering the costs differ. . . . In making the distinction between the method of recovering the costs of confining and maintaining convicted criminals and of caring for and treating the criminally insane, we hold that such difference is not

> unreasonable. . . . We can see no constitutional inequality in requiring those receiving more expensive care to be liable for additional costs through assets which they may have accumulated." *State of Colorado vs. Burnell,* supra at pg. 40

The relevancy of the above remarks to appellant's due process argument raised in their Brief ("Reply on Application for Supersedeas") under Section C thereof logically indicates that at least the Colorado Supreme Court considered due process in light of both Colorado and Federal Constitutional requirements. Of significance in this regard, is the Colorado Court's omission to cite any Federal authority in support of its due process position. Equally significant is the Court's complete and patent reliance upon C.R.S. 1963, 105-4-171 to find C.R.S. 1963, 71-7-1 (1965 Perm. Supp.) constitutionally valid. No basis therefore, exists to conclude that the connecting due process link between two Colorado Statutes was determined by the Colorado Supreme Court solely on the Fourteenth Amendment of the United States Constitution. And certainly, even disregarding the improbability attaching to such a conclusion, this Court cannot so find with "reasonable certainty" or indeed any certainty whatsoever. Rather, the Colorado Supreme Court's reliance upon Colorado's Constitution is indicated when it is considered that the due process issue as raised by Appellant specifically required that Court to apply Sec. 25, Article 2 of Colorado's Constitution. Moreover, research discloses no Federal decision pertinent to the facts of the instant case and hence, there were no federal constitutional guidelines to influence the Colorado Supreme Court. Appellee, therefore respectfully submits that the decision of the Colorado Supreme Court must necessarily rest upon Sec. 25, Article 2, Constitution of Colorado and Colorado case law thereunder.

C. The Determination of the Federal Equal Protection Question by the Colorado Supreme Court was not Necessary for Determination of the Controversy.

Appellee submits that analysis of the entire record of the instant case conclusively indicates the Colorado Supreme Court's due consideration and ensuing determination that:

> C.R.S., 1963 71-7-1 (1965 Perm. Supp.) did not violate the Equal Protection of Laws Clause of the Fourteenth Amendment of the United States Constitution. C.R.S. 1963, 71-7-1 (1965 Perm. Supp.) did not violate Colorado's due process provision set forth in Colorado. Const., Art. II, Sec. 25.

The conclusions reached by the Colorado Supreme Court regarding the Federal Equal Protection question were based directly upon issues raised by Appellant's brief, filed with the Colorado Supreme Court entitled "Brief of Defendant in Error" and designated as "Reply on Supersedeas." Section B of Appellant's aforesaid brief presented the Equal protection issue as follows:

> "Kirchner held that the charge Statute was a 'species of Taxation' arbitrarily charged to one particular class of persons, that no rational basis supported the classification, and that the Statute therefore denied Equal Protection of the Law. *The Equal Protection Inquiry here, then, is whether the class of criminally insane persons confined in the State Hospital is a constitutionally valid class as distinguished from criminally insane persons confined in the penitentiary. The Court below held that it did not." Appellant's Reply on Supersedeas.* Section B, pg. 5 (emphasis ours)

Thus, Appellant in its role as proponent of the Federal Equal Protection question directed the Colorado Supreme

Court's consideration to whether a valid distinction existed between the criminally insane and Court sentenced criminals. In this connection it is to be noted that Appellant's Equal Protection assertion against a valid distinction was adopted by the Denver Probate Court to find C.R.S. 1963, 71-7-1 (1965 Perm. Supp.) unconstitutional. Responding to the foregoing Court holding and Appellant's support thereof, the Colorado Supreme Court stated its position with regard to the Equal Protection question as follows:

> "*Additionally*, we believe the Probate Court erred in classifying the criminally insane with those found guilty of crimes and incarcerated in the State Penitentiary. This classification cannot be found in any legislative enactment. The legislative classification grouped the criminally insane with all persons who are adjudicated mentally ill or mentally deficient. With such classification that Statute then provides that regardless of how the person has been committed, all persons being treated in the same institution are charged for the cost thereof with recovery from the estate if any, being the same in all instances. We see nothing unreasonable or unequal in this classification." (emphasis ours) *State of Colorado vs. Burnell*, 439, P2d 40 (1968)

Clearly the format of this holding conforms directly to the issue developed by Appellant's Equal Protection "inquiry". Consequently, it is possible to separately consider the Colorado Supreme Court's Equal Protection determination and attention is therefore directed to the word "additionally" used by the Colorado Court to introduce that determination. Thus, the word "additional" is defined as follows:

- "Added, coming by way of addition. *Extra*, supplementary. —Additionally (adv.)" (emphasis ours)

Webster's New Collegiate Dictionary, (Merriam Webster Edition 1954, pg. 10)

"Extra", in turn, is defined:

"Beyond or greater than what is due, usual, or necessary . . ." *Webster's New Collegiate Dictionary,* supra, pg. 293

It can now be seen that the Colorado Supreme Court's determination of the Federal Equal Protection question was neither the "sole basis for the decision" nor necessary for disposition of the controversy. Therefore, jurisdiction of this honorable Court cannot be extended to the Cause herein by virtue of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

CONCLUSION

On the basis of the foregoing discussion, Appellee maintains that Section 25, Article 2, of the Colorado Constitution provides the due process basis for the decision of the Colorado Supreme Court. Appellee further maintains that the Colorado Supreme Court's determination of the Federal Equal Protection question was not necessary for disposition of the controversy. Therefore, it is urged that the Appeal herein be dismissed in order to finally terminate this Case and absolve this Court's obligation to decide a substantial constitutional question.

Dated at Denver, Colorado this 8th day of August A.D., 1968.

Respectfully Submitted

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